

ARTICLE

THE RIGHT TO PRIVACY UNDER THE MONTANA CONSTITUTION: SEX AND INTIMACY

Patricia A. Cain*

“What has been is what will be, and what has been done is what will be done; *there is nothing new under the sun.*” *Ecclesiastes* 1:9 (my emphasis)

“There are more things in heaven and earth, Horatio, than are dreamt of in your philosophy.” William Shakespeare, *Hamlet*, act I, sc. 5.

I. INTRODUCTION.

What is Privacy? Why is it important? What does it mean to have a right to privacy? How can we tell when the right is

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infringed? This series of questions has been discussed widely amongst legal scholars and philosophers for over 100 years. Most discussions of the right of privacy begin with the 1890 Harvard Law Review article on privacy written by Samuel Warren and Louis Brandeis.¹ Despite this article's import, other legal scholarship on privacy was slow to follow. In the 1930s, law review articles on privacy were few and far between, averaging only 3 or 4 publications a year.² By the mid-1960s, however, more than 30 articles a year were published on the right to privacy.³ In more recent years, the number of published law review articles on privacy is close to 100 a year.⁴ Add to these articles a score of books from the 1960s to the present that analyze the right to privacy in depth,⁵ and one can understand why the homily from Ecclesiastes came to mind. Surely, anything I might try to add to this debate over privacy is likely to be something someone else has already said – “nothing new under the sun.” Yet, there is always the hope of being more creative and far-thinking than Horatio.

Defining privacy has been, and continues to be, a group project to which lawyers, philosophers, scientists, and the common citizen have much to contribute. It is a project that seeks answers to a number of questions, including whether privacy is an independent concept with a unique meaning or is merely an alternative word for freedom, autonomy, or dignity. If privacy is a unique personal right, then when and under what conditions might it be trumped by other important rights or

1. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

2. INDEX TO LEGAL PERIODICALS, 1931-1934, at 753 (Eldon R. James ed., H. W. Wilson Company 1935).

3. INDEX TO LEGAL PERIODICALS 1964-1967, at 667-668 (Mildred Russell ed., H. W. Wilson Company 1967).

4. INDEX TO LEGAL PERIODICALS & BOOKS, SEPTEMBER 1998-AUGUST 1999, at 1058-1061 (Richard A. Dorfman ed., H. W. Wilson Company 1999).

5. See generally ANITA L. ALLEN, *UNEASY ACCESS: PRIVACY FOR WOMEN IN A FREE SOCIETY* (Rowman and Littlefield 1988); EDWARD J. BLOUSTEIN, *INDIVIDUAL AND GROUP PRIVACY* (Transaction Books 1978); MORRIS L. ERNST & ALAN V. SCHWARTZ, *PRIVACY: THE RIGHT TO BE LET ALONE* (The Macmillan Co. 1962); JULIE C. INNESS, *PRIVACY, INTIMACY, AND ISOLATION* (Oxford University Press 1992); VINCENT J. SAMAR, *THE RIGHT TO PRIVACY: GAYS, LESBIANS, AND THE CONSTITUTION* (Temple University Press 1991); PHILOSOPHICAL DIMENSIONS OF PRIVACY: AN ANTHOLOGY (Ferdinand D. Schoeman, ed., Cambridge University Press 1984); STEFANA SCOGLIO, *TRANSFORMING PRIVACY: A TRANSPERSONAL PHILOSOPHY OF RIGHTS* (Praeger 1998); PHILIPPA STRUM et al., *PRIVACY: THE DEBATE IN THE UNITED STATES SINCE 1945* (Hardbrace 1998); Richard C. Turkington and Anita L. Allen, *Privacy Law* (2d ed. 2002); ALAN F. WESTIN, *PRIVACY AND FREEDOM* (Atheneum 1967).

interests?

The people of Montana contributed importantly to this group conversation and debate when they adopted Article II, Section 10 of the Montana Constitution in 1972. That clause provides: "The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest."⁶

In this single, elegant sentence, the state of Montana created the strongest protection for privacy rights of any state in this country.⁷ The delegates at the Constitutional Convention expressed their support for strong privacy rights again and again.⁸ They believed privacy was so important that Montana

6. MONT. CONST. art II, § 10.

7. Prior to 1972 only four states had specific references to privacy in their state constitutions. Washington's constitution provided "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." WASH. CONST. art. I, § 7. In 1912, Arizona adopted the exact same language in its Constitution. ARIZ CONST. art. II, § 8. The 1970 Illinois constitution specifically protects against invasions of privacy in Article I, § 6, dealing with searches and seizures. In addition, Section 12 of Article I provides: "Every person shall find a certain remedy in the laws for all injuries and wrongs which he receives to his person, privacy, property or reputation." The South Carolina constitution, adopted in 1971, protected the people against unreasonable searches and seizures in a provision that specifically provided that "unreasonable invasions of privacy shall not be violated." S.C. CONST. art. I, § 10. None of these provisions is worded as strongly as Article II § 10 of the Montana Constitution. In 1972, the same year that the new Montana constitution was adopted, the Alaska constitution was amended to provide: "The right of the people to privacy is recognized and shall not be infringed. The legislature shall implement this section." ALASKA CONST. art. I, § 22. Finally, in 1978, Hawaii included a privacy provision in its constitution that borrows in part from Alaska and in part from Montana. It provides: "The right of the people to privacy is recognized and shall not be infringed without the showing of a compelling state interest. The legislature shall take affirmative steps to implement this right." HAW. CONST. art. I, § 6. *See also* CAL. CONST. art. I, § 5 (privacy is an inalienable right); LA CONST. art. I, § 5 (protection against unreasonable searches includes protection against invasion of privacy); FLA. CONST. art. I, § 23 ("Every natural person has the right to be let alone and free from governmental intrusion into the person's private life except as otherwise provided herein. . ."). In all, there are ten state constitutions that contain explicit protection against invasions of privacy. The Montana, Alaska, and Hawaii provisions are the most strongly-worded.

8. *See*, MONTANA CONSTITUTIONAL CONVENTION, TRANSCRIPT OF PROCEEDINGS, Vol. VII 5179-5182 (Montana Legislature 1981),

"... the right of privacy is a right that is not expressly stated in either the United States or the Montana Constitutions. It is our feeling on the Bill of Rights Committee that the times have changed sufficiently that this important right should now be recognized . . . In our early history, of course, there was no need to expressly state that an individual should have a right of privacy. Certainly, back in 1776, 1789, when they developed our bill of rights, the search and seizure provisions were enough, when a man's home was his castle and the state could not intrude upon this home without the procuring of a search warrant with probable cause being stated before a magistrate and a search warrant being issued. No other protection was necessary and this

should offer greater protections to individuals than the federal government provided.⁹ Indeed, some delegates thought privacy so important it should be an absolute right under the state constitution. To accomplish this, the delegates amended the proposal to strike the “compelling state interest” phrase, fearing that to allow any justification would offer too much support for state invasions.¹⁰ Upon reconsideration, the phrase was reinserted, but only because many delegates feared that not to require a “compelling” justification might lead the courts to support state intrusions for lesser reasons.¹¹

Section 10 makes express in the Montana constitution that which is only implicitly present in the U.S. constitution.¹² The Montana Supreme Court quickly announced its agreement that Section 10 created a right of privacy independent of the federal right,¹³ and more importantly, “that the protection it offers is more substantial than that inferred from the Federal Constitution.”¹⁴

In the years following adoption of the 1972 constitution, most of the Montana privacy cases arose in the context of search and seizure.¹⁵ Montana now protects the suspected criminal

certainly was the greatest amount of protection that any free society had given its individuals. In that type of a society, of course, the neighbor was maybe three or four miles away. There was no real infringement upon the individual and his right of privacy. However, today we have observed an increasingly complex society and we know our area of privacy has decreased, decreased and decreased . . . as a participating member of society, we all recognize that the state must come into our private lives at some point, but what it says is, don't come into our private lives unless you have a good reason for being there. We feel that this, as a mandate to our government, would cause a complete re-examination and guarantee our individual citizens of Montana this very important right the right to be let alone, and this has been called the most important right of them all.”

Id. cited in *State v. Means*, 177 Mont. 193, 209, 581 P.2d 406, 415 (1978).

9. David Gorman, *Rights in Collision: The Individual Right of Privacy and the Public Right to Know*, 39 MONT. L. REV. 249, 250 (1978). See discussion of the constitutional convention.

10. See comment of delegate Harper. MONTANA CONSTITUTIONAL CONVENTION, TRANSCRIPT OF PROCEEDINGS, Vol. V, 1682 (Montana Legislature 1981), cited in *Mont. Human Rights Div. v. City of Billings*, 199 Mont. 434, 438, 649 P.2d 1283, 1286.

11. See Gorman, *supra* note 9, at 251. See also discussion of this point in the proceedings of the Browning Symposium, September 12, 2002, Delegates' comments after paper presented by Professor Melissa Harrison.

12. *Griswold v. Conn.*, 381 U.S. 479, 484 (1965) (Douglas, J., describing privacy as within the penumbra of other specifically guaranteed rights).

13. *State v. Coburn*, 165 Mont. 488, 497, 530 P.2d 442, 446 (1972).

14. *State v. Hyem*, 193 Mont. 51, 62, 630 P.2d 202, 208 (1981); *Montana Human Rights Div. v. City of Billings*, 199 Mont. 434, 439, 639 P.2d 1283, 1286 (1982).

15. As David Gorman observed in his article, “the court . . . has not extended the

from unwanted intrusions more extensively than the federal government does. Thus, one might conclude that a large part of the meaning of the “right of privacy” is the expectation that certain personal facts or private areas cannot be uncovered or searched by suspecting policemen. Citing to legal scholar, Charles Fried,¹⁶ the Montana Supreme Court, in deciding an early Section 10 privacy case, explained that “[p]rivacy has been defined as the ability to control access to information about oneself.”¹⁷

But the convention delegates understood privacy to include more than protection from unreasonable searches or the right to control personal information. Convention documents cite to court opinions that discuss the right of privacy as the “right to be let alone”¹⁸ and as the right to choose not to procreate when engaging in sexual activities.¹⁹ Rick Applegate’s Study on the Bill of Rights, prepared for the Constitutional Convention Commission,²⁰ cites to the early theoretical development of the concept of privacy rights by Warren and Brandeis,²¹ to work done in the 1960s by Alan Westin,²² and to the West German principle that “everyone shall have the right to the free development of his personality, insofar as he does not infringe the rights of others . . .”²³

Citations to these outside sources suggest that the framers of the Montana constitution intended to enlarge the scope of the right to privacy to include substantive rights in addition to the right to be free from unjustified searches in one’s own home. Furthermore, the very fact that the delegates proposed a distinct privacy provision separate from Section 11 of the Declaration of Rights, which covers search and seizure, indicates an intent to protect a concept of privacy greater than the geographical security in one’s home.

scope of the right of privacy beyond the context of search and seizure law in the five years since the adoption of the new constitution.” Gorman, *supra* note 9, at 253.

16. Charles Fried, *Privacy*, 77 YALE L.J. 475, 482-3 (1968).

17. *Hyem*, 193 Mont. at 62, 630 P.2d. at 209.

18. *Welsh v. Roehm*, 125 Mont. 517, 522, 241 P.2d 816, 819 (1947).

19. *Griswold*, 381 U.S. at 487.

20. RICK APPLGATE, BILL OF RIGHTS, CONSTITUTIONAL CONVENTION STUDY NO. 10 (Montana Constitutional Convention 1971-72).

21. Warren & Brandeis, *supra* note 1, at 193.

22. Applegate, *supra* note 20, at 242, citing Westin, *Science Privacy and Freedom: Issues and Proposals for the 1970s*, 66 COLUM. L. REV. 1231 (1966). See also ALAN F. WESTIN, *PRIVACY AND FREEDOM* (Atheneum 1967).

23. Applegate, *supra* note 19, at 240-242.

By 1972, privacy rights were understood to protect at least three different types of interests: (1) the right to be free from unreasonable searches; (2) the right to informational privacy; and (3) the right to make certain personal decision free from governmental intrusions. As one commentator has described these interests, they involve: (1) "search and seizure rights," (2) "disclosural rights," and (3) "autonomy rights."²⁴

For the first ten years following adoption of the new Montana Constitution, privacy rights cases focused primarily on "search and seizure rights."²⁵ By the mid-1980s, the Court was faced with a different series of cases in which it was required to balance the constitutional "right to know"²⁶ against the right to individual privacy.²⁷ In these cases, the Court began to develop the outer limits of "disclosural rights."²⁸

It was not until 1997 that a case involving autonomy rights came before the Montana Supreme Court.²⁹ The specific question before the court was: does the right to privacy include the right of two persons of the same sex to be sexually intimate with each other in private space where their sexual expressions have no immediate impact on anyone other than the two individuals who consent to the intimacy?

24. Jon Devlin, *Privacy and Abortion Rights Under the Louisiana State Constitution: Could Roe v. Wade Be Alive and Well in the Bayou State?* 51 LA. L. REV. 685, 691 (1991).

25. Gorman, *supra* note 9, at 250. See also Melissa Harrison & Peter Michelson, *The Evolution of Montana's Privacy-Enhanced Search and Seizure Analysis: A Return to First Principles*, 64 MONT. L. REV. 245 (2003).

26. MONT. CONST. art. II, § 9. Providing:

No person shall be deprived of the right to examine documents or to observe the deliberations of all public bodies or agencies of state government and its subdivision, except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure.

27. See, e.g., *Missoulain v. Bd. of Regents*, 207 Mont. 513, 675 P.2d 962 (1984); *Belth v. Bennett*, 227 Mont. 341, 740 P.2d 638 (1987).

28. Also dealing with the right of privacy as applied to the disclosure of personal information are *Hastetter v. Behan*, 196 Mont. 280, 639 P. 2d 510 (1982) (privacy rights in telephone records); *Mont. Human Rights Division v. City of Billings*, 199 Mont. 434, 649 P.2d 1283 (1982) (privacy rights in personnel records).

29. *Gryczan v. State*, 283 Mont. 433, 942 P.2d 112 (1997). One earlier case might be described as a privacy case dealing with "autonomy rights." In *Town of Ennis v. Stewart*, 247 Mont. 355, 807 P.2d 179 (1991), the defendants asserted a privacy right in refusing to hook their residences to the town water system. This right of refusal and the concomitant right to choose the source of water to be consumed within the home can certainly be characterized as privacy right in the sense of personal autonomy. The Montana Supreme Court, however, did not view this particular decision as sufficiently personal and intimate to be accorded constitutional protection. See *infra* at n.85 discussing *Ennis* further.

The court, in line with almost every state appellate court that has been asked to consider this question³⁰ post *Bowers v. Hardwick*,³¹ held that the constitution of Montana did protect such a right. In rejecting the federal standard set forth in *Bowers*, i.e., that same-sex intimacy was unprotected by the federal notion of privacy, the Montana Supreme Court, in *Gryczan v. State*, made it abundantly clear that the scope of privacy rights in Montana was broader than the federal right.

The decision was unanimous, although one judge, Chief Justice Turnage, disagreed as to the rationale, basing his decision on the equal protection clause rather than on the right to privacy. Thus *Gryczan* stands as a clear decision in support of individual privacy rights against state invasion.

In 1999, the Montana Supreme Court again handed down a unanimous decision based on the Section 10 right to privacy. *Armstrong v. State*³² established that, in Montana, a woman's right to choose how to terminate her pregnancy enjoys greater protection under the Montana constitution than it does under the federal constitution. The plaintiffs in *Armstrong* sought the right to terminate their pregnancies through the services of a certified physician's assistant even though a Montana statute required that all abortions be performed by licensed physicians. The plaintiffs originally filed in federal court challenging the Montana statute as a violation of federal privacy guarantees under *Roe v. Wade* and its progeny. When the request for a preliminary injunction reached the United States Supreme Court, that Court predicted that the *Armstrong* plaintiffs would not prevail on the merits and consequently denied the requested preliminary injunction. The plaintiffs subsequently filed their

30. Supreme Courts in Georgia, Arkansas, Kentucky, Tennessee have all struck down criminal statutes prohibiting same or opposite sex conduct so long as the conduct was consensual and in private. Intermediate appellate courts have ruled similarly in Michigan and Maryland. See discussion of state sodomy litigation in CAIN, RAINBOW RIGHTS 235-242 (1999). Louisiana and Texas courts have more recently followed the US Supreme Court opinion in *Hardwick* to uphold their state sodomy statutes against attack under the state constitution. A petition for certiorari is currently before the US Supreme Court in the Texas case. See *Lawrence v. State*, 41 S.W.3d 349 (Tex Ct. App., 14th Dist., en banc, 2001), *petition for discretionary review refused* (Tex. Crim. App. Apr 17, 2002), *petition for cert. filed*, 71 U.S.L.W. 3116 (U.S. July 16, 2002). [Note: Texas courts are bifurcated so that the top court of appeals for issues dealing with criminal law is the Court of Criminal Appeals, not the Supreme Court].

31. In *Bowers v. Hardwick*, 478 U.S. 186 (1986), the United States Supreme Court held that it was constitutionally permissible for a state to criminalize same-sex sodomy, even when it occurred between consenting adults in the privacy of the home.

32. 1999 MT 261, 296 Mont. 361, 989 P.2d 364.

challenge in state court. The Montana Supreme Court declared that the *Armstrong* plaintiffs did have a “right to choose” the provider of their choice under the Montana constitution.

Thus, with respect to autonomy rights, the Montana Supreme Court has twice ruled in favor of extending the scope of individual privacy beyond that recognized by the United States Supreme Court. In both instances, I believe the Montana court has ruled in accord with the “intent of the framers” of the 1972 constitution. These rulings should be of interest to other states with specific privacy protections in their constitutions. But a more interesting question is whether or not the expansion of individual rights under state constitutions should have any effect on the interpretation of the scope of individual privacy rights under the federal constitution.

Two questions interest me as I consider the Montana privacy clause. They are:

1. What are the attributes of “privacy” as a legal concept that cause some courts to recognize sexual intimacy as within its scope, while other courts fail to accord protection for such intimacy?

2. If sexual intimacy is correctly understood as being part of the core concept of “privacy” in Montana, then what effect, if any, should that have on our understanding of “privacy” under the federal constitution?

In addressing these two questions, I will focus on the *Gryczan* case and the Montana Court’s recognition of a “privacy right” that protects sexual intimacy. I will first analyze the *Gryczan* holding (See Part II) and then explore the broader constitutional understanding of privacy as it relates to sexual intimacy (See Part III). Finally, I will make some observations about the relationship between state constitutional rights to privacy and the scope of the federal right. (See Part IV).

II. THE GRYZCAN CASE.

In 1973, the state of Montana revised its penal statutes to decriminalize opposite-sex sodomy, but retained the crime of “deviate sexual conduct” between persons of the same sex as a felony, punishable by up to 20 years in prison.³³ In 1991, the maximum penalty was reduced to 10 years.³⁴ “Deviate sexual

33. MONT. REV. CODE ANN. § 94-5-505, *amended by* 1973 Mont. Laws 1360.

34. MONT. CODE ANN. § 45-5-505 (2001) *amended by* 1991 Mont. Laws 426. Alternatively, the person could be fined \$50,000, or could be both fined and imprisoned.

conduct” was defined so broadly that it would prohibit almost any sexual touching between two persons of the same sex, whether or not the touching involved the genitals and whether or not the persons were fully clothed.³⁵ Under the statutory scheme, it would be virtually impossible for any two people of the same sex to engage in sexual foreplay, or perhaps even to kiss each other,³⁶ without risk of violating the statute.

The plaintiffs, three lesbians and three gay men, challenged the constitutionality of the “deviate sexual conduct” statute³⁷ under the Montana constitution. The Montana Supreme Court held the statute violated the plaintiffs’ right to privacy, guaranteed them by Article II, Section 10.

The result is absolutely consistent with Montana’s constitutional history and the concern that its citizens have expressed for individual rights and for freedom from government intrusion. That history is conveniently summarized in a recent law review article published in the Albany law review.³⁸

Yet, the author of that article, William Rava, takes the *Gryczan* court to task, concluding that although they got the right result, the judges got there via the wrong reasoning. The primary criticism is that the Montana Court relied on United States Supreme Court cases in determining the scope of the state constitutional right to privacy. Given Montana’s constitutional history of wishing to grant greater protections to individuals under the state constitution than under the federal constitution, the author argues that it is inappropriate to rely on federal precedent regarding privacy. But *that* the *Gryczan* court did not do. It did not *rely* on federal precedent; it did not *follow* *Bowers v. Hardwick*. The two federal cases the court did in fact

35. “Deviate sexual conduct” is defined as engaging in “deviate sexual relations,” which in turn is defined at Mont. Code Ann. § 45-2-101(20) (2001) to include “sexual contact or sexual intercourse between two persons of the same sex. . . .” “Sexual intercourse” is defined broadly enough to cover any penetration of anus or vulva, whether by penis, other body part, or foreign object. See MONT. CODE ANN. § 45-2-101(66) (2001). Thus the statute appears to criminalize not only fellatio and cunnilingus, but also digital sexual stimulation. “Sexual contact” is broadly defined so as to include any sexual stimulation of a same-sex partner’s intimate parts. See MONT. CODE ANN. § 45-2-101(65) (2001).

36. If the lips are considered “intimate parts,” then kissing for the purpose of arousing the other person would violate the statute. See *id.*

37. The deviate sexual conduct statute is often referred to as a sodomy statute since it prohibits the act of sodomy (i.e., anal intercourse) as well as certain other sexual acts (e.g., cunnilingus and fellatio).

38. See William C. Rava, *Toward a Historical Understanding of Montana’s Privacy Provision*, 61 ALB. L. REV. 1681 (1998).

cite are an odd pair: (1) *Katz v. United States*,³⁹ which is a “search and seizure” privacy case under the Fourth Amendment, and (2) *Palko v. Connecticut*,⁴⁰ which is not a privacy case at all, but does deal with the substantive concept of due process.

Katz is cited for the notion that when individuals have reasonable expectations of privacy, those expectations ought to be honored by the government. The defendant in that case expected privacy of communication in a phone booth.⁴¹ The government’s taping of the conversation and subsequent use of the tape against him violated his privacy rights. *Katz* overruled *Olmstead v. United States*,⁴² which had held that evidence obtained via wiretapping presented no constitutional infringement of the 4th amendment, even though the lines that were tapped were to the phone in the defendant’s residence. While *Katz* did concern geographic limits to expectations of privacy, the Montana Supreme Court used the *Katz* “reasonable expectation” test to help determine the substantive, rather than geographic, limits of privacy. In doing so, the court implies that geography and substance are not unrelated. Conversations (substance) are protected within certain reasonable geographical areas. Similarly, sexual intimacy (substance) is protected within reasonable geographic areas.⁴³ The Montana Court’s application of the “reasonable expectation” test in a privacy case dealing with “autonomy” rather than “search and seizure” appears to be original⁴⁴ and should be viewed as a creation of Montana privacy

39. 389 U.S. 347 (1967).

40. 302 U.S. 319 (1937).

41. While in 1967, one might have a reasonable expectation of privacy in a phone booth, it is not clear that such expectations would be reasonable today. Telephone booths have changed over time from enclosed cabinets to open kiosks with very little protection from other people or the elements. See, e.g., JOHN J. DOMERS, TELEPHONE CONNECTION 89-97 (1983) (photos of early phone booths, some with double walls, dome roof, rugs and lace curtains). Advertisements for early phone booths describe them as “sound-proof.” *Id.* These old phone booths are vanishing, in part due to vandalism, and are being replaced by unenclosed booths or phones on open shelves. *Id.* at 91. See also P.J. POVEY & R.A.J. EARL, VINTAGE TELEPHONES OF THE WORLD (Peter Peregrinus Ltd.1988).

42. *Katz*, 389 U.S. at 353 (1967); overruling *Olmstead*, 277 U.S. 438, 468 (1928).

43. Patricia A. Cain, Remarks at the University of Montana School of Law Symposium (Sept. 12, 2002) During the symposium, I commented that while conversations in phone booths might carry reasonable expectations of privacy, sex in phone booths might not. I reiterate that point here and stress the fact that while geography matters so does the conduct. Thus, not all conduct within the privacy of the home is protected and not all conduct that is worthy of protection will be protected when it occurs in public.

44. Indeed, other state courts have cited *Katz* for the proposition that it has

doctrine, independent of federal precedent. Mr. Rava's criticism that the court unduly relied on federal precedent seems misplaced.

Palko, also relied upon by the *Gryczan* court, is cited for the idea that the scope of a fundamental right under the due process clause is determined by asking whether the right is "fundamental or implicit in the concept of ordered liberty." The claimed fundamental right in *Palko* was the right not to be tried twice (double jeopardy), a right secured against the federal government by the Fifth Amendment. Nonetheless, the Supreme Court held that a state had the power to appeal an acquittal and retry a defendant without violating the concept of ordered liberty.

Neither *Katz* nor *Palko* focused directly on the scope of the substantive right to privacy, which was the specific question before the Montana court. The *Gryczan* court crafted the privacy definition to include same-sex sexual intimacy without direct reference to federal precedent regarding the *scope* of substantive privacy under the federal constitution. This is exactly what it should have done, whether it cited some U.S. Supreme Court cases along the way or not. Its use of the theoretical concepts, "reasonable expectations" and "ordered liberty," from those two cases are what is important. Using these concepts, the Montana Supreme Court is building its own privacy jurisprudence. And while these concepts may be too general to help anyone predict where that jurisprudence might lead,⁴⁵ the flexibility they give the court is in keeping with the "intent of the framers" of the 1972 Constitution. The delegates intentionally refrained from defining "privacy," intending for the Montana Supreme Court to have that power and intending for the Court to construe the right broadly.⁴⁶

Was the court correct in its determination that sexual intimacy is within the core constitutional definition of privacy? Are there philosophical or other theoretical notions of privacy, beyond the *Katz/Palko* formulation, that support the result in

nothing to do with substantive rights of privacy, and limits privacy protection to a narrow class of search and seizure fact situations. See *Shevin v. Byron, Harless, Schaffer, Reid & Assoc.*, 379 So. 2d 633 (Fla. 1980).

45. Justice Turnage's concurrence explicitly raises concerns about the future. *Gryczan*, 283 Mont. at 458, 942 P.2d at 127. What additional privacy rights might the court elect to protect in the future? Will the court, for example, include the right to assisted suicide within the realm of protected privacy?

46. Delegate Campbell, Remarks at the University of Montana School of Law Browning Symposium (Sept. 14, 2002).

Gryczan? These are the questions addressed in the following section.

III. THE ATTRIBUTES OF PRIVACY.

A. History of the Debate.

The question, what is within the core concept of the right to privacy, has been much debated, particularly by legal theorists and philosophers.

In his 1967 book, *Privacy and Freedom*, Alan Westin⁴⁷ begins: "Few values so fundamental to society as privacy have been left so undefined in social theory..."⁴⁸ Westin, as a member of the Special Committee on Science and the Law of the Association of the Bar of the City of New York, spent over four years working on the challenges that advancements in technology were likely to pose to individual privacy. Focusing on arguments that an increase in surveillance of individuals could benefit society as a whole, Westin turned to psychological studies that showed the harm caused to individuals when they knew or thought they were being observed for long periods of time. "Privacy is not merely a personal predilection, said Robert Merton, "it is an important functional requirement for the effective operation of social structure."⁴⁹ Utopian communities, such as those founded by Robert Owen, have often failed because "silent monitors" prevented individuals from experiencing required moments of solitude.⁵⁰

In the law, "privacy rights" are discussed primarily in the realm of constitutional law and tort law. Early discussions were confined to the law of torts since the constitutional right of privacy was not recognized until 1965.⁵¹ Generally attributed to an early Harvard Law Review article drafted by Samuel Warren and Louis Brandeis, the core of the tort concept has been described as "the right to be let alone." That concept in fact originated in an early treatise penned by Thomas Cooley in 1880.⁵²

47. Westin is one of the privacy theorists cited in APPLEGATE, *supra* note 19.

48. WESTIN, *supra* note 5, at 7.

49. ROBERT KING MERTON, *SOCIAL THEORY AND SOCIAL STRUCTURE* 375 (Free Press 1968).

50. WESTIN, *supra* note 5, at 59.

51. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

52. THOMAS M. COOLEY, *A TREATISE ON THE LAW OF TORTS* 29 (1st ed. 1880).

In 1960, the “dean of torts,” William Prosser criticized the Warren/Brandeis formulation, claiming that there was no single core right to privacy, but instead that invasions of privacy consisted of four distinct torts:

1. Intrusion upon the plaintiff’s seclusion or solitude, or into his private affairs.
2. Public disclosure of embarrassing private facts about the plaintiff.
3. Publicity which places the plaintiff in a false light in the public eye.
4. Appropriation, for the defendant’s advantage, of the plaintiff’s name or likeness.⁵³

Just four years later, in 1964, Professor Edward Bloustein, then Professor of Law at NYU, later to become president of Rutgers University, countered Dean Prosser and argued that privacy did have a central core concept linked to the idea of individual dignity.⁵⁴ Bloustein argued that Prosser missed a crucial point about privacy by analogizing the instances in which it is invaded to four distinctive tort claims.

Intrusion upon one’s solitude, says Prosser, is like the tort of intentional infliction of emotional distress. The paradigmatic case cited in the Warren/Brandeis article to illustrate the privacy claim was a case in which a mother in childbirth complained about an intruder who witnessed the birth.⁵⁵ Bloustein argues that the woman’s privacy right was infringed whether she experienced emotional distress or not.⁵⁶ The injury is more primary and direct than the consequential distress. The injury is to her individuality, to her human dignity.

Similarly, the public disclosure of private facts cases, which Prosser analogizes to tort cases that impair reputation (e.g., libel and slander), involve a more primary and direct interest than reputation. Some things are so private they should never be disclosed by third parties whether they can be proved to affect reputation or not. Individuals have a primary right to keep certain facts away from the public, or at least to decide when

53. See William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 389 (1960).

54. See Edward J. Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. REV. 962 (1964). The article was prepared for the Special Committee on Science and Law of the Association of the Bar of the City of New York, the same commission that inspired Alan Westin’s work on privacy. The original version of the article was delivered at a privacy conference in 1964. *Id.* at 962.

55. See *De May v. Roberts*, 9 N.W. 146 (Mich. 1881).

56. Bloustein, *supra* note 53, at 972.

and how to release them. The *Sidis* case is a prime example of the invasion of such a right.⁵⁷ Sidis had been an infant prodigy, well-known to the general public, but later he decided to withdraw from the public eye and live his life in seclusion. The *New Yorker* did a story on him, depriving him of that seclusion, but in no way harming his reputation. Thus, argues Bloustein, the harm is a unique one,⁵⁸ the right invaded is a unique one, and it is not dependent on impairment of reputation.⁵⁹

During the 1960s, the United States Supreme Court handed down three key cases that expanded the legal understanding of the right to privacy. The first case, *Griswold v. Connecticut*,⁶⁰ was handed down in 1965. Justice Douglas, writing for the Court, held that a state criminal law banning the distribution of contraceptives violated the constitutionally-protected right of privacy.⁶¹ The right of privacy is not explicit in the United States constitution. *Griswold* was an important turning point in constitutional jurisprudence because it was the first case to announce that privacy is a separate constitutional right, derived in part from other rights, such as the right to be free from unreasonable searches⁶² and the right to keep soldiers out of one's home.⁶³ While *Griswold* located the privacy right in the intimate marital relationship, subsequent cases extended the right to use contraceptive devices to unmarried persons.⁶⁴ Only two justices, Black and Stewart, dissented in *Griswold*.

57. See *Sidis v. F-R Publ'g Corp.*, 113 F.2d 806 (2d Cir. 1940).

58. Bloustein, *supra* note 53, at 977-78.

59. But, as I explain later in this article, invasion of the right does depend on what sort of information was released to the public. The difficulty for Sidis was that the article described his personal traits and intimate living space. It is the release of these intimate details that constitutes an invasion of privacy. See discussion *infra* pp. ____ (discussing privacy as intimacy).

60. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

61. Laws forbidding the dissemination of information about contraception arose in the nineteenth century. At the state level, two types of laws were passed, (1) those that declared printed material about such information obscene and (2) those that banned birth control. The laws were enacted in response to complaints raised in the late 1800s by self-appointed purity societies such as the New York Society for the Suppression of Vice; MICHAEL GROSSBERG, *GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH CENTURY AMERICA* 157-159 (1985).

Anthony Comstock was the best known spokesperson for these "purity" laws. In 1873, Congress passed a federal bill criminalizing the sale or other distribution of literature about birth control. That law became known as the Comstock Law. See 17 Stat. 598-99 RICHARD C. TURKINGTON & ANITA L. ALLEN, *PRICACY LAW* 759-60 (2d ed. 2002)

62. See U.S. CONST., amend. - IV.

63. See U.S. CONST. Constitution, amend. III.

64. See, e.g., *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

In 1967, in a Fourth Amendment case (the *Katz* case cited in *Gryczan*), the Court held that a defendant had a reasonable expectation of privacy when he made a telephone call from a public telephone booth. Thus information gathered via a government wiretap invaded his right and was inadmissible. The important notion in *Katz* was that “the constitution protects persons not places,” thereby expanding the earlier search and seizure jurisprudence to cover intrusions into spaces other than the most private of places, the home and the body. *Katz* created a two-pronged legal test for when the right of privacy exists. The first prong focuses on the subjective expectation of the individual. The second prong tests the limits of the subjective expectation by asking whether the expectation is reasonable. *Katz* reversed an earlier case, *Olmstead*, decided in 1928, in which the court had found that wiretapping did not violate a privacy right so long as the government agents committed no trespass and did not physically invade the defendant’s home or office. Brandeis had dissented in *Olmstead*, explaining:

The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man’s spiritual nature, of his feelings and his intellect. . . . They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against government, the right to be let alone – the most comprehensive of rights and the right most valued by civilized men.⁶⁵

In this dissent, Brandeis articulates the right of privacy as a constitutional right, the same right he had described in the 1890 Harvard Law Review as a right that should be protected by the common law. In *Katz*, the Court vindicated his view of the constitution. Justice Potter Stewart, who had dissented in *Griswold* penned the majority opinion. Only Justice Black dissented.

Then in 1969, the Court unanimously held that the state of Georgia could not constitutionally prosecute Robert Stanley when state agents, entering Stanley’s home under a legal warrant searching for evidence related to gambling activities, instead discovered obscene pornographic films in his possession. The Court held that although the public production and sale of obscenity is subject to state regulation, the private enjoyment of it within the sanctity of the home is protected. Justice Marshall, writing for the Court, quoted the portion of the Brandeis dissent

65. *Olmstead v. U.S.*, 227 US 438, 478 (1928).

excerpted above.⁶⁶

Federal Constitutional privacy doctrine as of the early 1970s consisted of two distinct types of precedent: (1) cases involving geographical distinctions (*Stanley*) and (2) cases involving individual decision-making (*Griswold*).⁶⁷ In this lexicon, it should be noted that *Katz* does not fit neatly into either classification. Something is being protected in *Katz* that is based on considerations beyond geography and yet the thing that is being protected is not a personal decision intimately linked to personal autonomy. At the same time, the facts in *Katz* exemplify the sorts of concerns many Americans felt during the 1960s because of the government's increased surveillance activities, as well as the technological advances that made government abuses in this area much more possible.⁶⁸

The Montana constitutional convention delegates did not explain what they meant by the right to privacy. They contend that their intent was to keep the concept open for subsequent elaboration by the Montana Supreme Court.⁶⁹ Yet, based on the timing of the constitutional convention, it is extremely likely that the delegates had in their minds the concept of privacy developed by Warren and Brandeis, as critiqued by legal and philosophical commentators in the 1960s, as well as the U.S. Supreme Court decisions of the 1960s. In addition, the 1960s had witnessed an increased awareness and concern about technological invasions and government surveillance.⁷⁰ What do all of these concepts of privacy have in common? Is there a core content to the notion of privacy that can coherently and accurately describe all these instances in which privacy is thought to be of concern? Those are the questions that were at the center of the Prosser/Bloustein debate.

That debate continued into the 1970s with new scholars, some from law, some from philosophy.⁷¹ In 1975, philosopher Judith Jarvis Thomson argued that privacy does not exist as a

66. *Id.* at 564, 568-69 (Not all Justices joined the Marshall opinion, although all justices, even Black, held that *Stanley* could not be prosecuted).

67. Note that before final adoption of the Montana constitution, the privacy right recognized and protected in *Griswold* had been extended to unmarried couples who wished to engage in nonprocreative sex. See *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

68. WESTIN, *supra* note 5.

69. See case cited *supra* note 11.

70. WESTIN, *supra* note 5.

71. See, e.g., Richard B. Parker, *A Definition of Privacy*, 27 RUTGERS L. REV. 275, 280-81 (1974); Gary L. Bostwick, *Comment, A Taxonomy of Privacy: Repose, Sanctuary, and Intimate Decision*, 64 CAL. L. REV. 1447 (1976).

single coherent concept.⁷² Although we believe intuitively in privacy as an important right, Thomson says, “privacy” is in fact nothing more than something we experience as part of a more important first-level right, e.g., rights involving ownership of property or personal integrity. One’s right to be free from surveillance is nothing more than the right to exclude others from my property and to prevent others from invading my bodily integrity. Under this view, privacy is merely a derivative right. Thomson claims that it would be more valuable for us to talk about the first-level rights and abandon talk of privacy as though it were something unique that could stand on its own. She is aided in her argument by the fact that privacy does have many different meanings, as Prosser had pointed out in his work. And, despite Bloustein’s attempt to refute Prosser’s points, subsequent philosophical discussions about the right had failed to establish a single all-encompassing definition that was satisfactorily coherent. Thus, Thomson’s articulation of the problem with “privacy” struck a responsive chord.

As Ferdinand Shoeman explains, Thomson’s attack on privacy as a core concept is two-fold.⁷³ One argument is that “privacy” is not a coherent concept, that the many instances that we identify as raising privacy concerns do not share any one characteristic that makes them similar or related. A second argument is that “privacy” is not a “distinctive concept,” that privacy concerns can be explained in terms of other interests, such as interests in property or interests in personhood. Thomson’s critique of privacy occurs on both fronts. She denies both the coherence and the distinctiveness of privacy as a separate identifiable right.

In 1980, legal theorist and philosopher Ruth Gavison countered Thomson by arguing that Thomson’s reductionist approach is not helpful to the extent it encourages us to abandon “privacy” as a useful concept.⁷⁴ “Our everyday speech suggests that we believe the concept of privacy is indeed coherent.”⁷⁵ We know what we mean when we talk about losses of privacy,

72. Judith Jarvis Thomson, *The Right to Privacy*, 4 *PHILOSOPHY & PUBLIC AFFAIRS* 295-314 (1975), *reprinted in* *PHILOSOPHICAL DIMENSIONS OF PRIVACY*, *supra* note 5 at 272-289.

73. Ferdinand Shoeman, *Privacy: Philosophical Dimensions of the Literature*, *reprinted in* *PHILOSOPHICAL DIMENSIONS: AN ANTHOLOGY*, *supra* note 5, at 26-28.

74. Ruth Gavison, *Privacy and the Limits of Law*, 89 *YALE L. J.* 421 (1980), *reprinted in* *PHILOSOPHICAL DIMENSIONS: AN ANTHOLOGY*, *supra* note 5, at 346-402.

75. *Id.* at 423.

invasions of privacy, and legal violations of privacy rights. Some coherent concept of privacy must stand behind these linguistic expressions. Thus it is useful for our understanding of the legal right of privacy to explore what the connection is between the various contexts in which we think privacy is a central concern. Gavison's much-cited article is best known for its identification of three essential components of privacy: secrecy, anonymity, and solitude. In addition to this central point, Gavison makes a significant observation about the functions of privacy in a civilized society. First and foremost, privacy is the thing that makes it possible for us to live together when we profoundly disagree about important issues that are central to our individuality, things like religion and sexuality.⁷⁶

In 1998, Stefano Scoglio's book, *Transforming Privacy*, sets forth four core subdivisions for the concept of privacy:

1. Physical privacy, which is implicated in search and seizure cases.
2. Decisional privacy, which is implicated in the *Griswold/Roe* line of cases.
3. Informational privacy, which is about who can control access to personal information.
4. Formational privacy, which refers to the interest individuals have in self reflection and "critical interiority."

Scoglio argues that "formational privacy" is the most important dimension of privacy and that it has been the least developed of the various conceptions. He explains that formational privacy involves concerns about the invasion of individual minds by such things as mass media. As an individual privacy right, we might analogize it to the right to develop one's self individually, apart from the masses. It is a central aspect of the right to create individual conscience and personality, free from external forces that tend to press individuals toward conformity.

Most recently law professor Daniel Solove, in a 2002 article in the California law review, has offered us a new conceptualization of privacy. Relying on Wittgensteinian notions of "family resemblances," Solove breaks the notion of privacy down into 6 related areas, six families of privacy, if you will:

1. The Right to be Let Alone

76. *See Id.* I believe Gavison makes an important point here. Think about this for a moment. How many times has an agreement to stop the conversation, stop the argument, been an essential element in your ongoing relationship with: (1) colleagues, (2) neighbors, or (3) family members?

2. Limited Access to the Self
3. Secrecy
4. Control Over Personal Information
5. Personhood
6. Intimacy

Solove is careful to explain that this is not a taxonomy of privacy concepts, but rather a grouping of notions derived from how others talk about privacy. In addition, he notes the importance of identifying whether the concept of privacy under discussion is thought to be an end unto itself or merely a means to some other end. In my own opinion, while "personhood" may be thought of as an end in itself, the other five concepts of privacy can be thought of as varying means that help one to accomplish the authentic creation of "personhood." Then in turn, individual authentic personhood is something that is necessary for the creation and continued well-being of a free society. All of these "means" contain some aspect of that thing we call privacy. If there is a necessary connection between the core of all these means and the creation of a free society, then privacy is necessary means. "The right of individual privacy is essential to the well-being of a free society."

I am not troubled by the claim that privacy is merely a means to certain valued ends. Neither is Solove. Understanding the role that privacy plays in different contexts helps us understand what it is about privacy that we value. And if what we value is the specific end that privacy enables us to attain, the fact that privacy may be merely a means rather than an end in itself does not detract from its value.

Julie Inness, by contrast, believes that it is important for privacy to be valuable in and of itself.⁷⁷ If privacy is valuable only because of what it can accomplish, then its value is lessened whenever privacy becomes less necessary to the attainment of the goal. As an example, she discusses the idea that privacy is thought to be necessary to the establishment of personal relationships. It is necessary because individual choice, unswayed by the state or others, is thought to be the best way an individual can choose a close friend or lover. But then, argues Inness, what if the world changed so that computers could make those decisions for us and the computer's decision was just as good as our own. Then how would we justify the value of privacy?

77. See INNESS, *supra* note 5.

Inness suggests that privacy is essential to choice and that there are three types of choices to which we allude when discussing privacy. They are: (1) information-based choices (we control release of information about ourselves), (2) access-based choices (we choose who can have access to us), and (3) decision-based choices about intimate actions. Yet she insists that to understand the primary importance of privacy, we must cut across all these categories and identify what is at the core of these different understandings.

B. Identifying the Core.

While Solove's and Scoglio's categorizations are helpful in discussing the importance of privacy, or the general meaning of constitutional privacy, I cannot resist the urge, as others before me, to discern the overarching theme, the *ratio decidendi*, the core of the thing. In this regard I agree with Julie Inness in her treatment of privacy in *Privacy, Intimacy, and Isolation*.⁷⁸ We protect "privacy," as opposed to property or personhood,⁷⁹ separately, for a very important core reason. For me, the core of privacy is connected with the creation of personhood, the process by which each of us creates an authentic self. In this regard, privacy is linked to Scoglio's notion of formational privacy⁸⁰ and Inness's notion of privacy as intimacy.⁸¹ To explain formational privacy further, Scoglio asks us to focus on the harm that removal of privacy causes.⁸² Without privacy, one may be subject to too much surveillance, and then one cannot develop personality that is authentic. Without privacy, without the ability to escape into solitude away from the propaganda of the masses, one cannot develop individual conscience. Without privacy, others, perhaps even the government, will know too much about an individual and can manipulate that individual in order to make the person meet their expectations. Without privacy we, as authentic individuals, cannot live together in a civilized society. Or, as the framers of the Montana constitution put it: "The right of individual privacy is essential to the well-being of a free society. . ."

78. See INNESS, *supra* note 5.

79. Judith Jarvis Thomson's thesis was that privacy interests could be reduced to interests in property or personhood. See Thompson, *supra* note 71.

80. See SCOGLIO, *supra* note 5.

81. See INNESS, *supra* note 5.

82. See SCOGLIO, *supra* note 5.

Julie Inness argues that privacy is intimacy and that is what makes privacy distinct from other values like autonomy. She also argues that privacy as a fundamental right is coherent because privacy in all its constitutional formulations involves intimacy. *Griswold*, as well as similar cases involving decisional privacy, was a case about intimate choices and that is what makes it important as a privacy case. We want individuals to be free to make intimate choices. Privacy as a fundamental right protects that freedom. We may wish to protect other personal choices, such as those made when exercising a right to vote, but we protect those choices for reasons other than privacy. *Stanley*, another privacy case, involved two types of intimacy.⁸³ One was the intimacy of place, the home. The other was the intimacy of sexual expression, not with another person, but alone. While the Court did not stress the fact that intimacy might be thought to exist because of the sexual content of the films that were seized, the Court did care about the interior life of the mind, another form of intimacy.⁸⁴ The *Stanley* Court thought it important that the materials seized were speech, even though a banned form of speech, and that the communication resulting from that speech was an intimate private communication only to Stanley in his home. *Roe v. Wade* was also a case about intimacy because it involved a potential family relationship. The government should not decide who is to be intimate with whom or who one chooses as family. *Moore v. City of East Cleveland*⁸⁵ is another privacy case in the intimate family relationship context. Freedom to choose who should have access to me is important, but privacy is implicated only when those choices are about intimate relationships.⁸⁶ For this reason, anti-discrimination laws that force merchants and employers to deal with persons they would prefer to avoid do not infringe the privacy rights of such merchants or employers. Customers and employees are not in

83. *Stanley v. Georgia*, 394 U.S. 557 (1969).

84. The State of Georgia argued that the prosecution in *Stanley* was necessary to carry out the state's interest in protecting Mr. Stanley's mind. ("If the State can protect the body of a citizen, may it not, argues Georgia, protect his mind?"). *Id.* at 560. The Supreme Court rejected the state's argument as nothing more than an attempt to control Mr. Stanley's moral thoughts, a purpose that is "wholly inconsistent with the philosophy of the First Amendment." *Id.* at 566.

85. 431 U.S. 494 (1977).

86. The Montana Supreme Court understands that not every case involving decisional autonomy is a constitutional privacy case. Decisional autonomy was certainly at issue in *Ennis v. Stewart* (i.e., the choice to not hook up to the city's water system), but the choice in that case had nothing to do with intimacy. 247 Mont. 355, 807 P.2d 179 (1991).

intimate relationships with merchants and employers.

The Montana constitution protects privacy of place in its section on search and seizure⁸⁷ (akin to the Fourth Amendment in the US constitution). It also protects individual dignity in a separate section.⁸⁸ The separate provision protecting privacy is either unnecessary because the core rights are protected by these other provisions, or, alternatively, privacy is something separate and distinct from geographical privacy and individual dignity. Indeed some writers have suggested that the *Gryczan* court got it wrong, not in result, but in reasoning, because the more appropriate section, the one that the court should have cited, is the “individual dignity” provision.⁸⁹

While the claim to individual dignity is a strong one and not unrelated to authentic creation of the self, I believe that “privacy” was in fact the key right in *Gryczan*.

Individual dignity is a value that is important in our public other-regarding lives.⁹⁰ The difference between other-regarding and self-regarding conduct is, according to Millians,⁹¹ the difference between public and private. Mill’s concept of the public/private divide has been criticized as unrealistically claiming that some actions occur in spheres that are totally private.⁹² This critique has some validity. All actions have consequences. Actions that occur in private can affect the public sphere. Nonetheless, I believe the concept of the public/private divide is useful in determining where to draw regulatory lines. Private spheres are necessary for the creation of individual authentic selves. Within these private spheres there is both self-regarding behavior and other-regarding behavior. The other-

87. See Mont. Const. art. II § 11.

88. See Mont. Const. art. II, § 4.

89. The fact that a law criminalizing only same-sex sexual intimacy is on the books is certainly an assault on the individual dignity of lesbian and gay persons. For further discussion of possible applications of the dignity clause see Matthew O. Clifford and Thomas P. Huff, *Some Thoughts on the Meaning and Scope of the Montana Constitution’s “Dignity” Clause with Possible Applications*, 61 MONT. L. REV. 301 (2000).

90. John Stuart Mill distinguished between other regarding and self regarding norms and behavior. Other regarding norms are necessary for us to live together in society. Thus, according to Mill, laws regulating public behavior were permissible to prevent harm, but laws regulating private behavior and our activities and choices as self regarding individuals were not justified. See generally JOHN STUART MILL, ON LIBERTY (1869).

91. By Millians, I mean persons who embrace the liberal philosophy of John Stuart Mill. *Id.*

92. See e.g., JAMES FITZJAMES STEPHEN, LIBERTY, EQUALITY, FRATERNITY 26-27 (R.J. White ed., Cambridge Univ. Press 1967) (1873).

regarding behavior that occurs in private spheres is different from the other-regarding behavior that occurs in public. Private other-regarding behavior is more intimate and connected to the production of authentic self in ways that are quite different from the ways in which public less-intimate relationships help constitute selfhood. I believe privacy is the correct core justification for the holding in *Gryczan* because it is about intimacy, not dignity.

Privacy (and the intimacy that it makes possible) is necessary for the creation of authentic personhood. I see myself and change myself in relation to others. If I am not allowed to make those adjustments that occur from intimate relationships protected by privacy, I am less likely to create an authentic self. Pressured by society, I am more likely to conform, to create myself as others want me to be.

In other words, the “privacy” that government may not intrude upon is that space, both literally and metaphorically, in which individuals create self. One very important way that we create self is through experiences of intimacy with others. Privacy then implicates intimacy and intimacy is a relational interest, not an individual interest.⁹³ Thus privacy is something more than individual dignity. Similarly, it is something more than autonomy. Intimate sex, a crucial part of the metaphorical space in which we create self, is at the core of the notion of privacy. The *Gryczan* court got it right and for the right reason.

So why is it that courts, such as the United States Supreme Court, who protect the decisional and spatial aspects of privacy in other intimate contexts, have not understood privacy to include the intimacy of private lesbian and gay sex? Is there some part of the core of privacy that they don’t get or is there something about intimate lesbian and gay sex that they don’t get? How can a court reconcile the fact that I am constitutionally protected if I choose to view obscene lesbian films in the privacy of my home, but I am not protected if I invite my female lover into my home to communicate intimately, to be more humanly vulnerable and real than the women on the screen?

To me, the only possible answer is that there is something about gay and lesbian sex that they don’t understand. Justice

93. While the language of Section 10 refers to individual privacy, it seems clear to me that the delegates used the term “individual” to indicate that corporations did not have the type of privacy interests that merit constitutional protection. See *Associated Press v. Mont. Dep’t. of Revenue*, 2000 MT 160, ¶¶ 45-131, 300 Mont. 233, ¶¶ 45-131, 300 Mont. 233, ¶¶ 45-131, 4 P.3d 5, ¶¶ 45-131 (Nelson, J., specially concurring).

White evidenced this misunderstanding when he claimed that "...no connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated."⁹⁴ When gay and lesbian committed couples read the majority opinion in *Bowers v. Hardwick*, the almost universal response is: "They're not talking about me. My partner and I are family."

Reading *Stanley* and *Bowers* together, the current privacy jurisprudence of the United States Supreme Court protects voyeuristic and impersonal sex, but not real and intimate sex. This is surely nonsense. Even worse, we have two recent state appellate opinions that follow *Bowers*. Within the past two years, both the Court of Criminal Appeals in Texas⁹⁵ and the Louisiana Supreme Court⁹⁶ have followed the lead of the United States Supreme Court and found that the enforcement of their state sodomy statutes against consenting adults in private violates neither the federal constitution, nor their respective state constitutions.

Why is the Montana court right and the Texas and Louisiana courts wrong? Quite simply because of this: if you allow the government to invade my privacy in such situations, none of us are safe from future invasions. And the invasion to which I refer is not an invasion of my geographic space – my castle, my home. Nor is it an invasion of my bodily integrity, my person, that I am concerned with. State laws that say the government can rightfully enter my home (or any other place) and arrest me for expressing sexual intimacy with my partner make it difficult for me to develop my personality, my selfhood, authentically. I will fear surveillance and thus not act openly and honestly. I will be prevented from developing an intimacy that will enable my trust of another human being, my partner, to flourish. I will be more likely to have my mind invaded by the censors and I will become more like the masses. And if and when we are all like one another, clones of one another, civilized society as we know it will cease. *"The right of individual privacy*

94. *Bowers v. Hardwick*, 478 U.S. 186, 191(1986). Inness makes this point as well, *supra* note 5 at 124-26.

95. *Lawrence v. State*, 41 S.W.3d 349, 362 (Tx. App. 2001) (en banc), *petition for discretionary review refused* (Tex. Crim App. 2002), *cert. granted* 123 S.Ct. 661 (Dec. 2, 2002).

96. *State v. Smith*, 99-2094 (La. 7/6/00), 766 So.2d 501, 504-5 (discussing opposite-sex sodomy); *Louisiana Electorate of Gays and Lesbians, Inc. v. State*, 2001-2106 (La. 3/28/02), 812 So.2d 626, 629 (discussing same-sex sodomy).

is essential to the well-being of a free society. . ."

C. Possible Criticisms of the Notion That Privacy is Intimacy.

1. Line-drawing: good versus bad intimacy.

If privacy includes expressions of sexual intimacy, then why not other private expressions of sex, such as sex with children or sex with drugs? If I need help freeing up the creative side of myself in order to understand new possibilities and to create new conceptions of self, then why doesn't privacy protect my choice to experiment with mind-expanding drugs? I think these questions are fairly easy to address. Arguments that support including certain activities within the constitutionally-protected sphere of privacy should be based on clarifying the commonality between intimacy as I've discussed it and the activity in question. As Julie Inness has pointed out, the person claiming an invasion of privacy may have the burden of showing that the facts in his or her case do in fact pose a question about the sort of privacy we value, the intimacy we value.⁹⁷ And, if society has disapproved of a particular activity (e.g., sex with children, use of drugs), then its inclusion in the class of fundamental privacy rights is at issue. One could not merely argue that free choice is always good because that is not what is at the core of privacy. Rather, one would have to argue that the choice to have sex with children was linked to the creation of authentic self. Such an argument would have to focus on the intimacy of the relationship and not just the sex, the intimacy would have to be one that was beneficial to the self-creation of both parties. Even if a court was convinced that privacy was implicated, counterbalancing values would be likely to justify the ban, e.g., protection of children, the value of health and sanity that are threatened when certain drugs are abused, even in private.⁹⁸ The only counterbalancing value that courts have identified in the gay and lesbian sex cases is the value of majoritarian morality – which attempts to persuade us to be just like them⁹⁹—not enough, in my view, to warrant the invasion of

97. Inness *supra* note 5, at 87-88.

98. But this argument re: countervailing values may be difficult to make in the case of some drugs, notably marijuana. See *Ravin v. Alaska*, 537 P.2d 494, (Alaska 1974)(holding that personal use of marijuana in the privacy of one's own home was protected by the privacy guarantee in the Alaska state constitution).

99. Cf. Bob Dylan, *To Ramona*, on "Another Side of Bob Dylan" (Columbia Records

privacy, and certainly not a compelling state interest.

Another possible objection to my argument that privacy is valuable because of the intimacy that it protects is that such a position leaves the government helpless in trying to protect the weaker person whenever intimacy goes bad. If all intimacy is good, there is no problem. But even taking children and drugs out of the equation, how can we tell in any individual case that the intimacy is good? Or, if intimacy is generally good, what is the moral argument in support of that proposition and is it strong enough to warrant a hands-off approach by the state (i.e., no regulation of intimacy) even though instances of bad intimacy may occur?

While my argument that privacy as intimacy is morally worthy of protection is not yet fully developed, I can sketch the outlines of the argument. First of all, my argument assumes that privacy as intimacy creates the possibility for authentic intimate human connection and is also a necessary step in the beginning of authentic social connection. The intimacy that I describe, experienced with one "other," is where one begins to curb one's own selfish appetite, one's base instincts, and begins to value aspects of human existence higher than self-appeasement. If one can lose one's self in the experience of someone else and then return, one is, in some sense, born again, with a new understanding of what it means to be human. The state should foster, not denigrate, the possibilities for such human connection.

There is no guarantee that all such intimacy will be good, that there will not be abuses of intimacy. Indeed, the risk that privacy will be abused is at the core of many feminist arguments in favor of deconstructing the public/private divide. And although I certainly count myself as a feminist, I cannot imagine a world in which the public/private divide has been eradicated. Yes, we have to talk about the personal, the private, in order to raise consciousness about abuses of power. But I also believe we have to curb our talk of the private sufficiently to protect the uniqueness of that intimate space that contributes so importantly to unique human connection. Finding the correct balance is the task of the 21st century.¹⁰⁰

1964) ("They'll hype you and type you into making you feel that you gotta be just like them.").

100. A new concept of the public/private divide is needed that will take into account individualistic notions of privacy (e.g., John Stuart Mill) and feminist notions that valuing privacy merely maintains patriarchal power relationships. *See generally*,

2. *Privacy is merely a form of liberty.*

Some theorists have described privacy as a form of liberty. While there is a certain family resemblance between the two, it seems to me that they are separate and distinct concepts. One can imagine a prisoner lacking liberty, but enjoying a relatively high degree of privacy. At the same time one can imagine a public figure enjoying quite a bit of freedom, but very little privacy. Linguistically at least, such formulations appear sensible.

Liberty, in the form of a constitutional right, has come to be thought of in the United States as the right to negative liberty. Political theorists such as Isaiah Berlin and John Stuart Mill have argued that the only sort of liberty a state should provide its citizens is negative liberty.¹⁰¹ For the state to become involved in the provision of positive or substantive goods might result in excessive state involvement in determining what does or does not constitute the good life. Liberal political theory requires that the state remain neutral on this question. Thus, the state is not required to provide any social, material, or political good other than individual freedom, which, so the argument goes, is fully protected by the state's guarantee of negative rights.

Returning to the various categories that have been used to describe privacy, reconsider Professor Solove's list. The first four conceptual categories identified by Professor Solove (i.e., the right to be let alone, limited access to self, secrecy, and control over personal information) clearly implicate notions of negative liberty. By this I mean the right of privacy is conceptualized as a private sphere in which I, as an individual, have a liberty interest and the state (or other individuals in the form of tortfeasors) are not permitted by the law to interfere with my sphere.

The "right to be let alone" includes the right to decide whether to use contraceptives when I engage in sexual intimacy.

CATHARINE MACKINNON, *FEMINISM UNMODIFIED* 92-103 (1987). I have attempted to shift the focus slightly in this article from the Millian notion that self-regarding norms are confined to private spheres and other-regarding norms to public spheres. In my view, other-regarding norms are also part of the private sphere. New concepts are created out of conflict. Thus, in time, as feminists criticize the traditional notions of privacy and the private sphere, new concepts will emerge. See, e.g., ANITA L. ALLEN, *UNEASY ACCESS: PRIVACY FOR WOMEN IN A FREE SOCIETY* (Rowman & Littlefield 1988).

101. See, Isaiah Berlin, *Two Concepts of Liberty*, in *FOUR ESSAYS ON LIBERTY* 118 (1969); JOHN STUART MILL, *ON LIBERTY* 16-17 (Liberal Arts Press, Inc. 1956).

This is a negative liberty because the state is asked to stay uninvolved, to do nothing. If I can't afford contraception, the state is not required to provide contraception. That would implicate a notion of positive liberty. "Limited access to the self," Solove's second conception of privacy, similarly involves a negative liberty.

Negative liberty is also at the core of my right to "secrecy" and "control over release of personal information," Solove's third and fourth conceptions, although positive liberty might be implicated if I should desire positively to release my story as a self-creating event and I had no means of doing so on my own.

"Personhood," Solove's fifth conception is derived from Paul Freund's notion that "personhood" includes "those attributes of an individual which are irreducible in his selfhood."¹⁰² This concept of privacy is more in line with the core content I have sought to identify. Privacy is necessary to the process of becoming a self, differentiated from other selves. Here, I am not talking merely about private space in a geographical sense, e.g., a room of one's own, although that too is important. Rather I mean the private intangible space where individual conscience is constructed and nurtured.

As I have outlined my argument that privacy is intimacy, I have shown the connection between "personhood" and intimacy. Privacy is necessary to the creation of intimacy. Intimacy is necessary for full development of individual personality, because I must experience self as connected with another, yet at the same time separate from others. While I include sexual intimacy within this concept, I mean to include other intimacies as well. Forms of religious intimacy, for example, often connect us to other human beings in a shared experience of God, or with the "ground of all being,"¹⁰³ or create shared spiritual connections with nature.

Borrowing from existential philosophy, I suggest that personhood and intimacy are necessary for full human development. One cannot be fully human if one does not understand one's separateness from others and yet, the moment one does understand that separateness, one yearns for a connection that will end the separation. One yearns for a certain degree of intimacy.

Negative liberty certainly plays a role in the development of

102. Daniel J. Solove, *Conceptualizing Privacy*, 90 CAL. L. REV. 1087, 1092 (2002).

103. See P. TILICH, *SYSTEMATIC THEOLOGY* 235 (1951).

personhood and intimacy. Negative liberty includes the right to be free from government intrusion and government regulation – or in the words of Warren and Brandeis, the “right to be let alone.”

Are the rights connected with personhood and intimacy merely examples of reasons why we wish to be let alone, i.e., to be let alone in order to more independently develop self and intimacy? Or do personhood and intimacy implicate something further? If private space is required – a room of my own, as it were, in order to create a mind of my own – then is it not at least arguable that the state should play its part in seeing to it that we all have a room of our own? If solitude, an element of privacy, is necessary for individuality and individuality is necessary for the continuation of civilization as we know it, then the state should do its part in seeing that we all have solitude. Being left alone by government is not sufficient. Warren and Brandeis, the guys who started this quest for the meaning of privacy, were concerned about relief from the prying eyes of neighbors. Tort law is one way to protect privacy. But today, now that the world is more crowded, more noisy, we have trouble finding solitude even when we escape the nosey neighbors. In this world, we should begin to think of the positive obligations that we might appropriately demand of government to help us find the solitude, the privacy, that is necessary, indeed “*essential to the well-being of a free society.*”¹⁰⁴

Privacy, as I have conceived it, implicates both negative and positive rights. Intimacy must be made possible by both restraining government (i.e., negative liberty) and by requiring positive protection for intimacy (i.e., positive liberty). Whether privacy is the same as liberty is irrelevant for my purposes. The important thing is that privacy as intimacy be guaranteed and protected under the law.

IV. GRYCZAN’S IMPACT ON THE FEDERAL CONSTITUTIONAL RIGHT TO PRIVACY.

It is hornbook law that the United States Supreme Court is the final arbiter of the meaning of the United States Constitution and that state supreme courts have the same position of interpretive power regarding their state constitutions. An increasing number of civil rights lawyers,

104. Laws aimed at protecting personal privacy have been enacted since the 1960’s. See, e.g., The Privacy Act of 1974, 5 U.S.C. § 522a.

fighting for the expansion of individual rights, have been turning to the state courts over the last 20 years, heeding Justice Brennan's advice that state courts might prove more supportive.¹⁰⁵ And, in many cases, the state courts have lived up to those expectations. This has been particularly true in the case of lesbian and gay rights.¹⁰⁶

While the United States Supreme Court has found that privacy does not include same-sex sexual intimacy, should it make a difference that state supreme courts have found that state constitutions do protect same-sex sexual intimacy? This question could not be more timely, given the Supreme Court's decision to review the same-sex sodomy case from Texas. The Court's grant of certiorari indicates a willingness to rethink its privacy jurisprudence and perhaps reverse *Bowers v. Hardwick*. At the same time, the Texas case might also be decided on equal protection grounds with little attention given to a reconsideration of privacy norms. In my view, the privacy jurisprudence developed in *Gryczan* and similar state court rulings is relevant to the issue currently before the United States Supreme Court. When thinking about this point, one should view the federal-state constitutional relationship in historical context. During the years of the Warren Court, federal constitutional protections increased individual rights particularly in the area of race relations¹⁰⁷ and criminal justice.¹⁰⁸ Because federal law is superior to state law, this increase in individual rights at the federal level served to increase an individual's rights against state governments as well.

This increase in rights had not always been the case. For example, in search and seizure law, federal supremacy did not increase individual rights at the state level until the Court

105. See William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535 (1986); William J. Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

106. The California Supreme Court found a violation of the state constitution's equality provision in a gay rights case as early as 1979. *Gay Law Students Assoc. v. Pac. Tel & Tel*, 595 P.2d 592 (Cal. 1979). Post *Bowers v. Hardwick*, many state courts have struck down consensual sodomy statutes under a state constitution. See, e.g., *Commonwealth v. Wasson*, 842 S.W.2d 487 (Ky. 1992); *Campbell v. Sundquist*, 926 S.W.2d 250 (Tenn Ct. App. 1996), *Powell v. State*, 510 S.E.2d 18 (Ga. 1998); *Jegley v. Picado*, 80 S.W.3d 332 (Ark. 2002); and, of course *Gryczan*.

107. See *Brown v. Bd. of Educ.*, 349 U.S. 294 (1955); *Loving v. Virginia*, 388 U.S. 1 (1967).

108. See *Mapp v. Ohio*, 367 U.S. 643 (1961).

decided to apply federal standards in determining the constitutionality of searches conducted by state officers.¹⁰⁹ In 1949, the Court had held that when state officials obtained evidence in violation of the Fourth Amendment principle against unreasonable searches (applicable to the states through the Fourteenth Amendment's due process clause),¹¹⁰ the federal exclusionary rule did not apply.¹¹¹ Thus such tainted evidence could be used to convict the defendant in state court even though it could not be so used had it been obtained by federal agents and used in a federal trial.¹¹² But with the Warren Court this phenomenon of greater federal protection/lesser state protection ceased. An increase of individual rights at the federal level meant that rights at the state level were similarly increased.

When the Burger Court ceased expanding individual rights against government, the view of the relationship between federal and state constitutions changed. As a result, the current view of the relationship between federal and state constitutional law has become one in which the federal constitution creates a floor for the protection of individual rights against government intrusion.¹¹³ In that case, states can ratchet up the protection,

109. *Id.*

110. The Court applied federal constitutional standards to the states through the incorporation doctrine, a doctrine which incorporated the Bill of Rights into the due process clause of the 14th amendment and thus applied those principles to prevent the states from infringing the same individual rights that the federal government was prevented from infringing. *See generally* LAURENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* 567-572 (1978).

111. *See Wolf v. Colorado*, 338 U.S. 25 (1949).

112. This difference in the strength at the state and federal levels of the individual's right against unreasonable searches led to the creation of the "silver platter" doctrine. Under the "silver platter" doctrine, since evidence obtained by state officers, even if obtained in an illegal search, was admissible, state agents could turn the evidence over to federal agents "on a silver platter" and the evidence would be admissible in the federal trial. In 1960, the United States Supreme Court abolished the "silver platter" doctrine, holding that evidence is inadmissible in a federal trial if it is acquired by a state officer in violation of federal search and seizure standards. *See Elkins v. U.S.*, 364 U.S. 206 (1960). In 1961, the exclusionary doctrine was applied to the states so that no constitutionally-tainted evidence could be used in a state trial. *Mapp*, 367 U.S. at 660.

Today the conflict between federal and state constitutional protections arises when a state officer violates a state constitution which offers more protection than the federal constitution and then turns the evidence over to a federal agent for prosecution in a federal trial. The federal court will not exclude the evidence even though the state could have done so. This set of facts creates a "reverse silver platter" situation. While there may be something troubling about state agents who avoid state constitutions by handing evidence over to a federal prosecutor, apparently the procedure raises no federal constitutional issues. *See John S. Baker, Jr., State Police Powers and the Federalization of Local Crime*, 62 *TEMPLE L. REV.* 673, 703-704 (1999).

113. This argument for the expansion of state constitutional rights "above the floor"

but they can never ratchet it down. Of course the explanation for why states can never ratchet down the protection of individual rights is that the Fourteenth Amendment applies to them and prevents the states from according less protection than the federal constitution commands, as construed by the United States Supreme Court. Thus, every individual, no matter what the state of residence or of temporary repose, has a uniform "floor" of protection against all governments.

In this context, it is interesting that the Montana Supreme Court cites *Palko* for the notion that a fundamental right is one that is rooted in the concept of ordered liberty. *Palko* of course used that notion to deny Frank Palko, the petitioner in that case, protection against the state's decision to subject him to double jeopardy,¹¹⁴ a right guaranteed by the federal constitution and interpreted in a way that gave stronger protections than the state law protection against double jeopardy. Thus the facts in *Palko* involved a case in which the higher federal protection was not available to Mr. Palko in the state of Connecticut. *Palko* was reversed 32 years later by *Benton v. Maryland*,¹¹⁵ in which the Court explained:

Palko represented an approach to basic constitutional rights which this Court's recent decisions have rejected. . . . Our recent cases have thoroughly rejected the Palko notion that basic constitutional rights can be denied by the States as long as the totality of the circumstances does not disclose a denial of 'fundamental fairness.' Once it is decided that a particular Bill of Rights guarantee is 'fundamental to the American scheme of justice,' . . . the same constitutional standards apply against both the State and Federal Governments. Palko's roots had thus been cut away years ago. We today only recognize the inevitable.¹¹⁶

Today the role of the Supreme Court in protecting individual rights against state intrusion is clear. Once the United States Supreme Court determines that a right is

was the primary message in a number of articles during the era of the Burger Court. See Brennan *supra* note 86 at 39. See also Donald E. Wilkes, Jr., *The New Federalism in Criminal Procedure: State Court Evasion of the Burger Court*, 62 KY. L. J. 421, 425 (1974); and Shirley S. Abrahamson, *Criminal Law and State Constitutions: The Emergence of State Constitutional Law*, 63 TEX. L. REV. 1141, 1144 (1985).

114. *Palko* (1937) was tried for first degree murder and found guilty of second degree murder. *Palko v. Connecticut*, 302 U.S. 319 (1937). The state appealed asking for the opportunity to try Palko again for first degree murder and the court allowed the second trial. The Supreme Court of the United States agreed and held that the individual right to not be tried twice for the same crime was not sufficiently rooted in our concept of ordered liberty. *Id.*, at 328.

115. 395 U.S. 784 (1969)

116. *Id.* at 794-95.

fundamental, it will be fundamental on both federal soil as well as the soil of all 50 states. Yet, it seems to me that a question of fundamental fairness arises when an individual's protection in something as important as personal intimacy can change significantly merely by the crossing of a state line. Indeed, if most states (and arguably all but two)¹¹⁷ protect that intimacy, surely we come to expect that our interests in intimacy will be protected by the law.¹¹⁸ At some point, the notion of fundamental fairness requires that individual rights be ratcheted up to the prevailing level, especially in cases where the increased protection causes virtually no harm to anyone else's right other than the right to state a moral code publicly.

The question that arises because of the new relationship between federal and state constitutions is whether the supremacy clause, or indeed the very structure of federalism prevents the United States Supreme Court from listening to and learning from the constitutional jurisprudence created in state courts.¹¹⁹

Our system of federalism is defended in a number of different ways. One claim is that it is better to make decisions at the local level because the government that is closer to the governed knows best how to govern.¹²⁰ Another claim is that we need the freedom to experiment amongst the fifty states with different ways of addressing problems.¹²¹ Presumably the more trial and error we experience as a nation, the more certain we can be that we have the right solution in the end. While this argument has been primarily used to justify restraints on Congressional action that would usurp the abilities of states to conduct their affairs differently, the argument can also be cited as support for a dialogue between the state and federal courts on

117. Louisiana and Texas, because in those two states appellate courts have recently reaffirmed the constitutionality of the sodomy statutes.

118. One might have made the same argument about the exclusionary rule. At the time the Court decided against recognizing the exclusionary rule as fundamental and thus applicable to the states, more than two-thirds of the states were opposed to the rule. By the time the Court decided in *Mapp* to reverse itself, over half the states had adopted the rule on their own. See *Mapp*, 367 U.S. at 651. Thus, notions of fundamental fairness at the state level are not irrelevant to notions at the federal level.

119. *But see, Id.*

120. Andrzej Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism after Garcia*, 1985 SUP. CT. REV. 345, 391. See also Erwin Chemerinsky, *Does Federalism Advance Liberty?*, 47 WAYNE L. REV. 911 (2001).

121. This "states as laboratories" argument is credited to Justice Brandeis in *New State Ice Co. v. Liebman*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)

the question of individual rights.¹²² When the United States Supreme Court failed to protect the private intimacy of same-sex couples in *Bowers v. Hardwick*, it left the question open for the states. At some point, it would seem to be the responsibility of that Court to say that enough experimentation has occurred.

Professor Erwin Chemerinsky has made a similar point in the context of federalism's limits on Congressional power.¹²³ If the states are left to experiment and that is a value in and of itself, who is to decide when the experiments are complete? If only Texas and Louisiana are left with valid statutes criminalizing same-sex sexual intimacy, is it perhaps time for the United States Supreme Court to enforce a new federal standard of privacy that will make us one nation again?

The state of Montana is fortunate to have elected judges, presumably close to the people, who understand the need for individual privacy and understand the role of intimate sexual relationships in creation of selfhood. The state of Montana is fortunate to have a Supreme Court that does not blindly follow the dictates of the United States Supreme Court. It is time for the United States Supreme Court to listen and to learn from the Supreme Court of Montana.

122. See Chemerinsky, *supra* note 118 at 928, pointing out that the "key questions are, when is it worth experimenting and when is experimentation to be rejected because of a need to impose a national mandate? The value of states as laboratories provides no answer to this issue."

123. See *Id.*, at 928-29, stating:

There also is a related process question: who is in the best position to decide when further experimentation is warranted or when there is enough knowledge to justify federal actions? A strong argument can be made that the need for using states as laboratories is a policy argument to be made to Congress against federal legislation and not a judicial argument that should be used to invalidate particular federal laws on the grounds that they unduly limit experimentation.